

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

UNITED STATES OF AMERICA,	:	
	:	
v.	:	Criminal No. 3:04 CR 151 (CFD)
	:	
JOSEF J. KUSTERER,	:	
Defendant.	:	

RULING ON PENDING MOTIONS

Pending are the following pretrial motions filed by the defendant Josef Kusterer:

Defendant’s Motion to Strike, Defendant’s Motion in Limine Re: Evidence of Other Alleged Wrongs Under Rule 404(b), and Defendant’s Motion for Election of Counts or to Sever. Each motion is discussed in turn.

I. Defendant’s Motion to Strike

The defendant has moved to strike the “Notice of Additional Factors” contained within the Government’s September 15, 2004 Superseding Indictment. At a pretrial conference held on April 14, 2005, the Government indicated that it did not oppose this motion. Therefore, based upon the agreement of the parties, the Motion to Strike [Doc. # 23] is **GRANTED**.

II. Defendant’s Motion in Limine Re: Evidence of Other Alleged Wrongs

In his motion in limine, the defendant seeks to preclude the Government from introducing his allegedly fraudulent business expense reports in its case in chief, on the grounds that such evidence is irrelevant and immaterial under Fed. R. Evid. 404(b) and unduly prejudicial under Fed. R. Evid. 403.

In the Government’s response memorandum to the motion in limine, it asserted that such evidence would no longer be part of its case in chief, while reserving the right to use such

evidence for impeachment or rebuttal purposes. Given the Government's statements to the Court, the Motion in Limine [Doc. # 61] is **DENIED AS MOOT**.

III. Defendant's Motion for Election of Counts or to Sever

Finally, the defendant has moved to sever Count 10 from the Indictment and for the government to elect trial on the remaining counts, on the ground that consideration of Count 10 will unfairly prejudice the jury against him. The Court heard argument on this motion on August 29, 2005.

Count 10, like each of the other counts the Government has charged against Mr. Kusterer, alleges wire fraud in violation of 18 U.S.C. § 3143. That count in particular, however, concerns a telefax allegedly transmitted by the defendant on the morning of September 11, 2001. The defendant argues that, given the historical and tragic significance of that date, "consideration of a charge of misconduct . . . would unfairly inflame the jury against the defendant." See Doc. # 60 at 2.

The Second Circuit has held that a district court may hold separate trials on properly joined counts or order a severance of counts under Fed. R. Crim. P. 14 if a defendant is prejudiced by joinder. In order to prevail on a motion to sever, however, "the defendant must show not simply some prejudice but substantial prejudice." United States v. Sampson, 385 F.3d 183, 190 (2d Cir. 2004) (quoting United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980)) (emphasis in original); see also United States v. Amato, 15 F.3d 230, 237 (2d Cir. 1994) ("Given the balance struck by Rule 8, which 'authorizes some prejudice' against the defendant, a defendant who seeks separate trials under Rule 14 carries a heavy burden of showing that joinder will result in 'substantial prejudice.'")

The Court finds that the defendant has not shown that he would suffer substantial prejudice by being tried on Count 10. Therefore, the Motion for Election of Counts or to Sever [Doc. # 59] is **DENIED**. The Court will consider whether it is necessary to give a limiting instruction at voir dire or at trial, in order to cure any potential prejudice caused by the events of September 11, 2001, and invites the parties to submit proposed curative language.

So ordered this _15th_ day of September 2005 at Hartford, Connecticut.

_____/s/ CFD_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE